

HAYNES AND BOONE ENERGY ROUNDUP

FALL 2019

haynesboone

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INTRODUCTION

The Haynes and Boone, LLP Energy Roundup report covers topics of current interest to the energy industry. Our Fall 2019 issue highlights a domestic and international energy industry where the one constant is change – change driven by both underlying commodity fundamentals and world events.

Our Fall 2019 Borrowing Base Redeterminations Survey predicts, for the first time since 2016, a decrease in credit availability for producers and a strong interest in alternative sources of capital. We highlight one of these alternative approaches with our article covering subscription credit facilities.

Oil and gas financing is seeing volatility, but the renewables space is growing rapidly, especially with respect to wind and solar power. We analyze the trends in this space and also take a look at the challenges ahead.

We hope you find the articles in this edition of the Haynes and Boone Energy Roundup interesting and informative.



FALL 2019 BORROWING BASE REDETERMINATIONS SURVEY

BY BUDDY CLARK, KRAIG GRAHMANN
AND JEFF NICHOLS

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Since April 2015, Haynes and Boone has conducted 10 borrowing base redetermination surveys, including one most recently in September 2019.

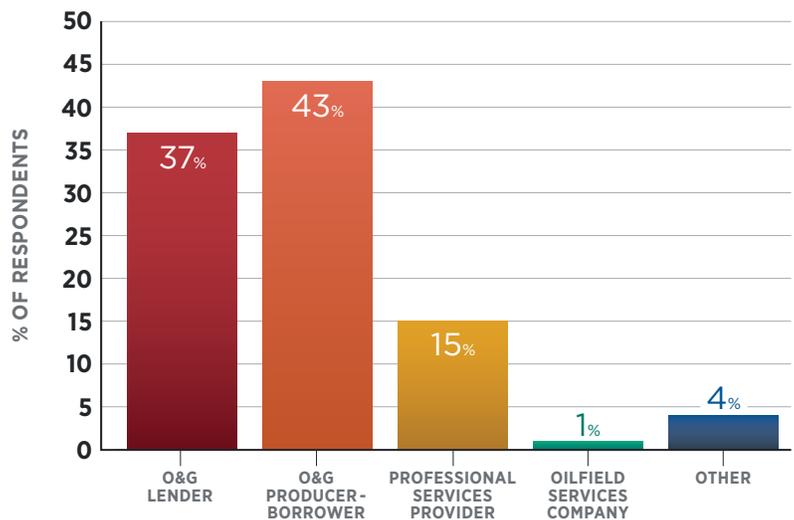
The 221 survey respondents included executives at:

- Oil and gas producers
- Oilfield services companies
- Financial institutions
- Private equity firms
- Professional services providers

The primary objective was to get a forward-looking and clear idea of what lenders, borrowers (oil and gas producers) and others are experiencing regarding borrowing base redeterminations in light of the price uncertainty in the commodity markets.

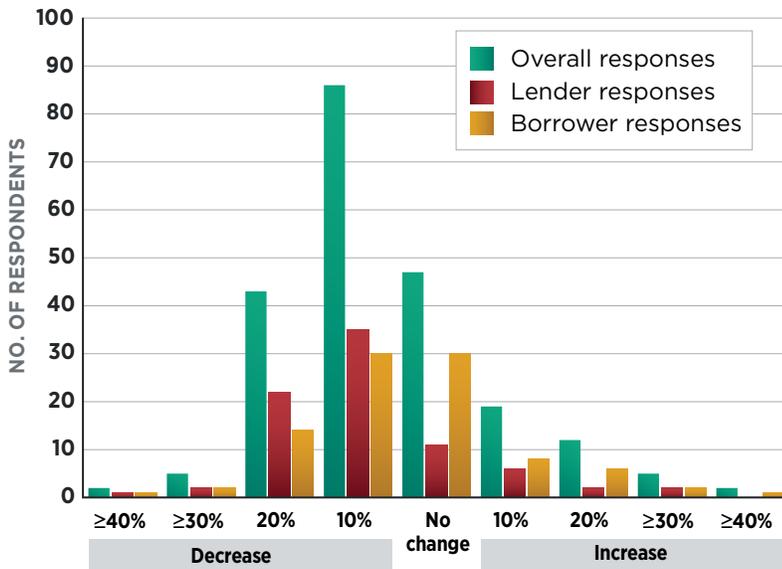
The following is a summary of the September 2019 survey results and an analysis of the responses.

Q. WHICH OF THESE BEST DESCRIBES YOU?



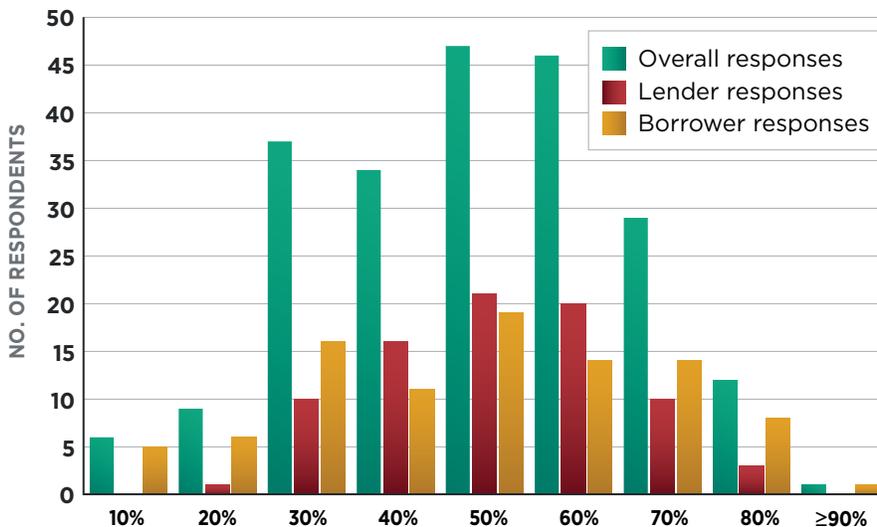
Q . WHAT PERCENTAGE DO YOU EXPECT BORROWING BASES TO CHANGE IN FALL 2019 AS COMPARED TO SPRING 2019?

For the first time since 2016, the majority of respondents are expecting borrowing bases to decrease in the upcoming redetermination season.

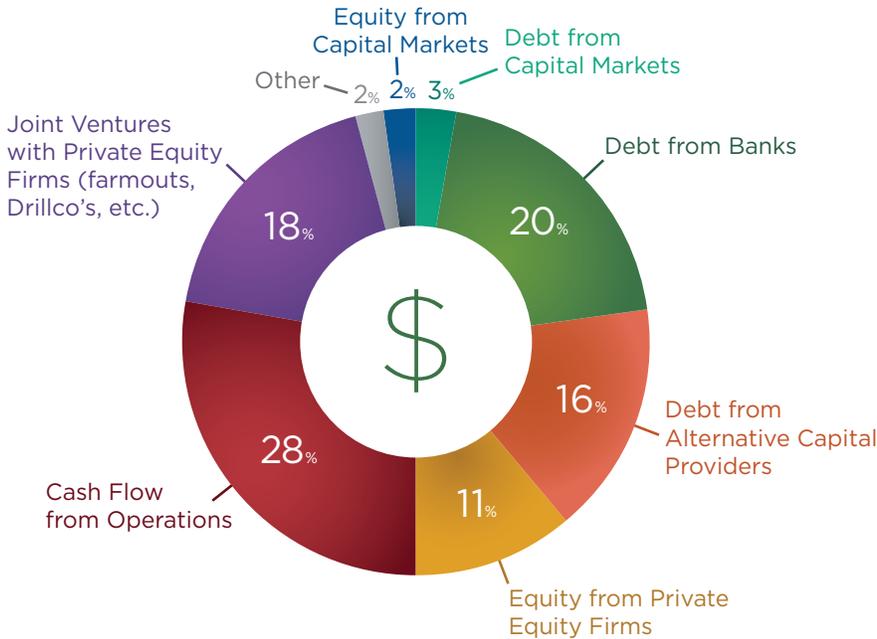


Q . ON AVERAGE, WHAT PERCENTAGE OF ANTICIPATED FUTURE PRODUCTION HAVE RESERVE-BASED CREDIT FACILITY BORROWERS HEDGED FOR THE NEXT 12 MONTHS?

Respondents are reporting higher hedging levels than in prior surveys, indicating that producers are more focused on reducing commodity price risk.



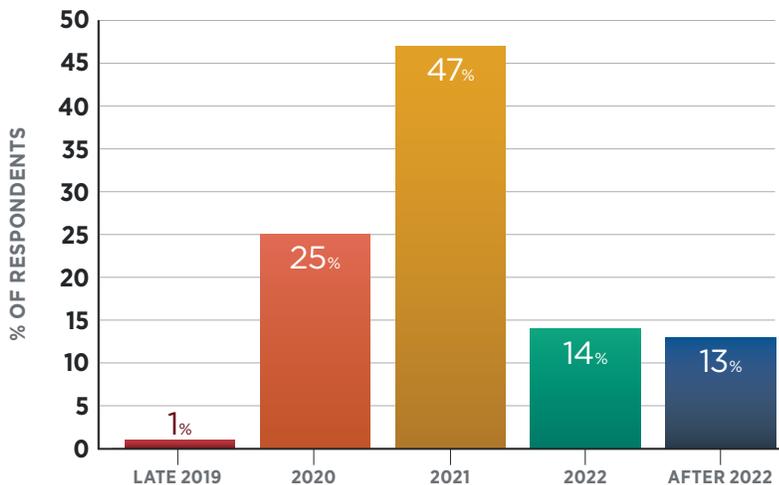
Q. WHERE ARE PRODUCERS PLANNING TO SOURCE CAPITAL FROM IN 2020?*



* Respondents could select more than one option. We collected 670 responses. The figures in the chart above indicate the percent of total responses for each option.

Q. WHEN WILL THE PUBLIC EQUITY MARKETS REOPEN FOR UPSTREAM OIL AND GAS COMPANY ISSUERS?

The vast majority of survey respondents believe that it will be 2021 or later before producers will have access to equity capital markets.



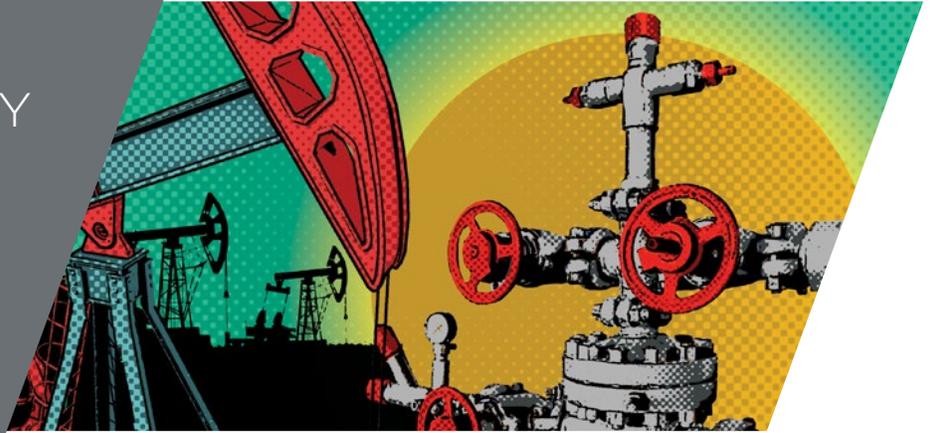
KEY TAKEAWAYS

- Reserve-based loan capital is becoming constrained. For the first time since spring 2016, the majority of respondents expect borrowing base decreases.
- Investors are pushing producers to improve cash flow. Increased hedging levels indicate producers are being more aggressive in protecting that cash flow from commodity price volatility.
- Utilization of debt and equity capital markets as a source of capital for producers has gone from small in the spring 2019 survey to miniscule in the fall 2019 survey. Alternative capital providers are filling the void with debt financing – the percentage of respondents seeing debt from alternative capital providers as a primary source capital has doubled since spring 2019.
- E&P companies will remain boxed in on capital sources for a while. Public equity markets – a primary source of capital for upstream oil and gas companies before 2018 – will not reopen until 2021 or later.

FALL 2019 ENERGY PRICE DECK SURVEY

BY BUDDY CLARK AND
JEFF NICHOLS

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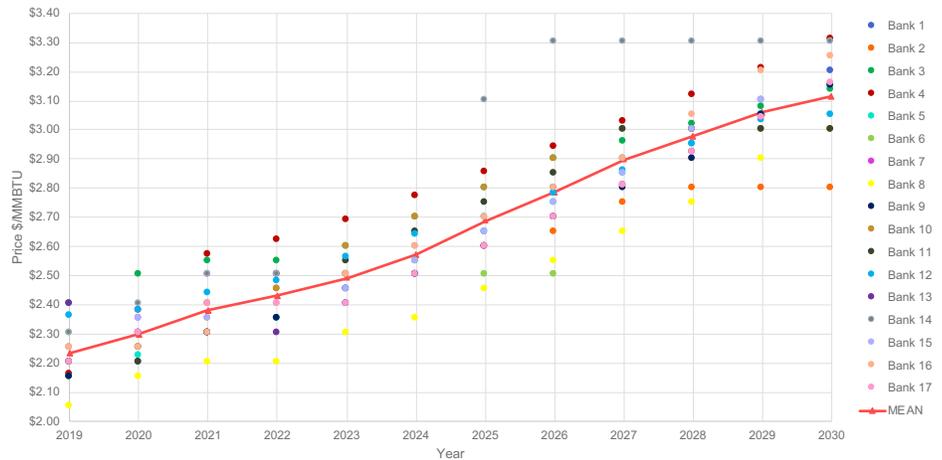


In connection with our survey of borrowing base expectations, we surveyed leading energy lenders for the current price deck they will be using in calculating Fall 2019 borrowing bases for their oil and gas producer borrowers. On balance, based on 17 responding energy lenders, average base oil price deck projections are 1.4% lower from last spring's price decks, and gas price deck projections are 6.5% lower from last spring.

OIL BASE PRICE - FALL 2019



GAS BASE PRICE - FALL 2019



ARE OIL AND GAS COMPANIES STILL HEDGING? *A SURVEY OF HOW OIL AND GAS PRODUCERS HEDGE*

BY SHANE RANDOLPH AND JOSH SCHULTE OF **OPPORTUNE LLP**

Energy markets continue to be volatile and producers continue to hedge. During the first three quarters of 2018, gas prices remained relatively flat while crude prices had a bumpy climb from \$60/bbl to nearly \$75/bbl. The fourth quarter brought volatility to both gas and crude markets. Cold weather and low storage heading into the winter heating season caused a short-lived spike in gas prices, which then returned to the \$3/MMBtu level by the end of the year. Meanwhile, from the beginning of October through the end of 2018, crude saw the largest decline in prices since 2014, falling from \$75/bbl down to \$45/bbl. This volatility in commodity prices is what drives many companies to implement a hedging program. The following is a survey of 30 of the largest public oil and gas producers and their hedging activities as disclosed in their December 31, 2018 10-K filings. It also includes comparisons to the same survey done in the prior year.

The following survey provides as much information as possible based on what was disclosed in regulatory filings. U.S. GAAP accounting rules form the minimum disclosures companies must provide in their filings to provide users with an understanding of:

- An entity's use of hedges
- How the hedges and the hedged production are accounted for in the filing
- How the hedges affect the financial statements

While the accounting rules require entities to disclose the level of an entity's derivative activity, there can be variance in practice as to how much information a company discloses about the instrument types, volume of production hedged and the average hedge price.

WHY HEDGE?

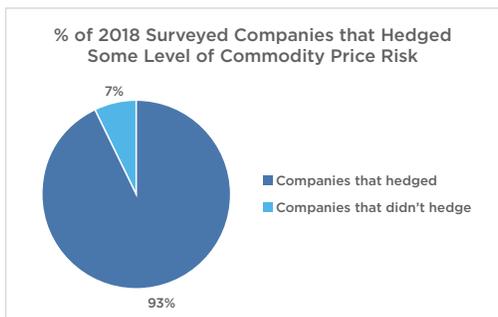
Upstream companies have relatively straightforward

objectives, which are to search for, develop and extract hydrocarbons. These activities are very capital intensive and require large amounts of cash. Companies need enough cash flow, not only to support a level of capital expenditures and exploration activity to ensure that oil and gas continues to flow, but also to make debt payments, comply with debt covenants and support the general and administrative costs. Hedging programs at upstream companies are developed with the primary purpose of providing a level of cash flow to increase the likelihood of meeting those needs.

Without the protection of an effective hedging program, an upstream company's cash flows are subject to the volatility of the market. An upstream company without hedges will benefit from higher market prices, but it has a very short amount of time to react when market prices decline. This is a predicament many upstream companies experienced during the 2014 price downturn.

The following outlines the percentage of companies in the survey that maintained hedges as of December 31, 2018 for crude, natural gas or natural gas liquids (NGLs). Consistent with prior years, it is clear that the majority of public oil and gas producers maintain hedging programs.





INSTRUMENT TYPES

While some companies will state that they have a hedging program and have executed hedges, investors should carefully consider the types of instruments utilized. The downside protection provided by some instruments may not be that significant. The chart below notes the number of companies holding various instrument types in their hedging portfolio.

For a producer, swaps provide the highest amount of downside protection. However, swaps limit upside price participation. This leads producers to utilize purchased puts, which can be costly, or costless collars, which allow the producer to participate within a range of price movements. Other instruments noted in the survey were swaptions and three-way options. Swaptions continue to represent a minority of the instrument types utilized by the public companies.

The use of three-way options (purchased put, sold call and sold put) were common in higher price environments when oil

prices were over \$80/bbl. However, many producers have been hurt by this strategy as it contains what some consider a trap door. For example, a producer with a \$40/bbl sold put, \$50/bbl purchased put and \$60/bbl sold call would participate in price movements between \$50/bbl and \$60/bbl. However, once the price goes below \$40/bbl, the company would have no downside protection as the price falls below \$40/bbl. This was particularly painful for many producers in 2014 that had sold puts in the \$65-\$75/bbl range under the belief that prices could never go below those levels.

Of the public oil and gas companies reviewed, swaps continue to be the preferred instrument for both natural gas and crude. A strategy utilizing both swaps and collars was common for both crude and natural gas. The types of instruments used for gas remained generally consistent with the prior year. However, for crude, the use of swaps decreased while the use of purchased puts increased. The use of crude collars and three-way collars were slightly less popular in 2018 than during 2017.

📄 *For further reading and analysis, please [download the full article.](#)*



MEXICO POWER MARKET: A POWERFUL OPPORTUNITY

BY GEORGE Y. GONZALEZ AND EDUARDO CORZO



The Mexican power market offers opportunities for private parties to participate in activities that in the past were reserved to the State. Now there are growing numbers of private generators and suppliers that together with marketers and qualified users, constitute this market.

With the 2013 Mexico Energy Reform, the power industry opened to private participants in certain activities. This important Energy Reform in the Mexican Constitution allows private companies to participate in the power sector, except for transmission and distribution which is considered a public service. The Constitutional Reform was soon followed by the enactment of secondary legislation of 2014 through the new power law: *Ley de la Industria Eléctrica* (the “Electric Industry Law”) which specifically provides for private parties to participate in power generation and trading. This open market initiative provides competition for the *Comisión Federal de Electricidad* (CFE) Mexico’s productive State-owned company which used to have the power industry monopoly in all aspects.

Although there is now space for competition in the generation of power, the CFE continues to

play a dominant role. Distribution and transmission are reserved activities of the State and the current government appears to continue supporting the CFE’s generation projects to strengthen the public power utility as in past administrations prior to the 2013 Mexican Energy Reform (co-generation and thermoelectric projects).

Private generators are to compete in the market alongside CFE’s generating units. On the purchase side of such market there will be power suppliers, marketers and qualified users (with load of at least 1MW). The wholesale market is in place to transact all energy sales, auxiliary services, transmission financial rights, capacity auctions, clean energy certificates (CELs) and related products.

20 GW

Recently, analysts of the Mexican economy have indicated an expectation that in order for Mexico’s industrial, manufacturing and other sectors to meet projected growth rates, together with the projected increase in Mexican population, the country would require an additional 20 GW of power over the next 20 years. The most assured mechanism to achieve this significant growth in power

capacity is for an active private sector to enter and participate in the development of the overall Mexican power market.

The current Electric Industry Law provides for two types of power supply: (i) suppliers only servicing qualified users (see below) and (ii) suppliers servicing users which are not qualified users, labeled “basic service suppliers.” Marketers may be traders between generators and suppliers or include the role of a supplier. The CFE or any of the subsidiaries it may create will be able to perform any of these activities, subject to legal and accounting separation requirements.

The State retains the public service of transmission and distribution of power. This public service will continue to be provided by the CFE through its special purpose subsidiaries. However, under the Electric Industry Law, the CFE may enter into joint ventures with private companies or investors for the financing, construction and operation of transmission and distribution projects.

One key feature of the Energy Reform is the obligation to

grant access to the grid to all generating and off-take facilities that wish to interconnect to the grid. The CFE will be required to interconnect its networks with all electric plants and load centers whose representatives request such interconnections, under conditions that are not discriminatory, so long as the facilities requesting such interconnection have complied with the technical requirements established by the State power system operator *Centro Nacional de Control de Energía* (CENACE) and the model contracts issued by the government regulator *Comisión Reguladora de Energía* (CRE). For the purpose of complying with this “open-access” principle, the Wholesale Electricity Market Rules define criteria and principles to be used by CENACE in order to establish an order of priority for interconnection requests.

PROFESSIONALS

Achieving sustainable growth in the power component of Mexican overall energy reform will require harmonization of the rules, regulations and market expectations with respect to

the legal and business regime in force in Mexico as to power generation and distribution prior to 2013/2014 as compared to the new power reform initiated as of and after 2013/2014. This harmonization and business process has provided opportunities for a diverse set of business consultants with power experience to become active in the Mexican market to the industrial sector and the private power sector and opportunities for new consultants and advisors hoping to become active in the market. A thorough legal analysis of the risks, gaps, omissions and inconsistencies in these two power generation and distribution framework regimes, both pre-2013/2014 reform and post-2013/2014 reform, will require market participants and new entrants to understand the two legal frameworks and how they relate to each other.

↓ For further reading and analysis, please [download the full article.](#)



RENEWABLES TRENDS AND REGULATORY UPDATES

BY CHAD MILLS, DANIEL LEE AND JOHN MONTGOMERY

For the first time, total wind generation outpaced coal as a source of power in Texas during the first half of 2019 according to an ERCOT Demand and Energy Report Working Paper, while solar projects and production in Texas have seen significant growth over the last few years. In Q1 and Q2 combined, wind and solar accounted for approximately 22% and 1% of total generation in ERCOT, respectively. This growth can be attributed in part to tax incentives, including the Production Tax Credit (PTC) and Investment Tax Credit (ITC), and

have decreased, making these resources more competitive. At the same time, Texas has faced unique issues this summer with wholesale power price volatility during peak periods, exacerbated in part by reliance on intermittent wind resources and the reduced supply of dispatchable resources. However, complementarity between wind and solar resources may soon alleviate these pricing issues in light of the accelerating pace of solar development in particular and the higher generation of solar power during peak demand periods.

of the previous six years but falling short of the 13.3 GW of wind capacity added in 2012 (when the PTC was initially set to expire). While wind facilities commencing construction in recent years have been subject to a yearly phase-down of the PTC, wind facilities commencing construction after 2019 are not be able to claim the PTC. After 2019, solar will continue to qualify for the 26% Investment Tax Credit (ITC) for projects that begin construction in 2020. Additional details of the PTC and ITC are shown in Table 1.

In addition to the PTC and ITC, corporate renewable procurement initiatives have been a significant driver of renewables development. According to a Wood Mackenzie study, corporate buyers accounted for 22% of all wind and solar PPAs in 2018, for a total of 5.8 gigawatts of renewable power. In particular, the materials, financial, consumer discretionary, and industrial sectors have led renewables procurement and consumption efforts, with numerous companies and municipalities committing to 100% renewables.

The decline in costs of wind and solar installation spurred on by corporate procurement efforts may help continue the trend in renewables growth despite increased regulatory uncertainty both for the federal incentives

corporate initiatives to procure renewable energy through power purchase agreements (PPAs). Although uncertainty surrounding renewables incentives and the pace of development has also increased with the nearing expiration of the PTC and phase down of the ITC, costs of installing solar and wind capacity

RENEWABLES GROWTH AND INCENTIVES

The Production Tax Credit (PTC) has been one major driver of wind project construction. The U.S. Energy Information Administration currently projects that U.S. wind capacity additions in 2019 will total 12.7 gigawatts (GW), exceeding annual capacity additions in each





discussed above and state renewable portfolio standards (RPS). Recently, some states have reconsidered or made downward revisions to their RPS targets. In Ohio, after initial legislative attempts to cancel the state RPS, the Ohio governor eventually signed a bill that instead truncated and decreased the Ohio RPS requirement, reducing the state's RPS target from 12.5% by 2027 to 8.5% by 2026, the amount that would have been required by 2022 under the previous RPS. In contrast, other states, including California, Connecticut, Massachusetts, and New Jersey increased their RPS targets (respectively to 60%, 44%, 35% and 50% renewables by 2030). However, many states, including Texas, have retained their RPS targets. The Texas RPS target of 10,000 MW by 2025 was reached in 2010.

PRICE PROBLEMS AND SOLUTIONS

Growth in renewables development has unsurprisingly coincided with a significant decrease in power prices,

including for wind and solar hedges and corporate PPAs. Yet, in contrast to decreasing PPA and hedge prices, wholesale power prices hit the \$9,000 ERCOT price cap in the month of August 2019, with reserves at one point hovering lower than three % of demand. The price peaks have sparked debate over the source of the problem as well as potential solutions. Unlike PJM, ERCOT does not have a capacity market to incentivize development and ensure sufficient capacity during peak demand times. The “Energy only” market structure relies on scarcity pricing to provide incentives for new generation, yet financial markets are proving resistant to financing baseload power projects in light of uncertain and highly volatile pricing. The absence of capacity payments has been cited by several generators as a significant barrier to construction of dispatchable generation, especially unsubsidized conventional sources. Even prolonged scarcity pricing signals in 2011 produced only a

limited number of new entrants from conventional sources, and many of those projects have faced bankruptcy or other financial distress. However, as demonstrated in PJM where the August 2019 capacity auction was recently cancelled until a further order is issued by the FERC revising the PJM market, capacity markets themselves may not always be reliable and are subject to a degree of regulatory uncertainty.

The variability of certain renewable power sources aggravates this issue, particularly in an energy-only market like ERCOT. While energy storage could theoretically provide a solution, the high costs associated with battery storage and insufficient incentives present obstacles to this solution. Battery installation has accordingly not kept pace with the rapid growth of wind and solar, and as of January 2019, only 89 MW of utility-scale battery resources were registered with ERCOT. Battery installation may eventually present a longer-term solution and is expected to increase due to declining battery technology costs. Approximately 2,300 MW of new battery capacity was under study in ERCOT as of December 2018. Yet phasedown of the ITC may also impact battery storage development as the ITC has been used for battery systems that are charged primarily by solar generation.

 For further reading and analysis, please [download the full article](#).

SUBSCRIPTION FACILITIES AS A USEFUL TOOL FOR ENERGY-FOCUSED FUNDS IN A CAPITAL CONSTRAINED ENVIRONMENT

BY ALBERT TAN, CHARLES ZANG AND PHONG TRAN

Subscription-secured credit facilities, or subscription facilities, are typically formed as revolving credit facilities that are secured by the right to call on the unfunded capital commitments of investors in real estate opportunity funds. However, as the private equity industry matured and investors and sponsors became more comfortable with subscription financing, its usage has become increasingly popular with other types of private equity funds, for example, buy-out, infrastructure, debt, and natural resources private equity funds. According to Fund Finance Association's estimate, the overall global market on subscription financing is approximately \$400 billion.

In recent years, an increasing number of energy-focused private equity funds have successfully utilized subscription financing for their investment and operational purposes. Although the use of subscription facilities has become more prevalent among general private equity investment funds, energy-focused private equity funds have, from an observer's perspective, under-utilized this useful tool, considering the many advantages of subscription



financing compared with other types of financing, as summarized below.

OVERVIEW OF SUBSCRIPTION FACILITIES

Under typical subscription facilities, the borrower or guarantor is structured as a limited partnership or limited liability company, with the limited partners or members consisting of institutional investors. Those investors that meet certain credit criteria (usually based on S&P or Moody's ratings) are designated as "Included Investors," and availability under the credit facility is generally calculated as 90% of the aggregate unfunded

capital commitments of such Included Investors.

Included Investors are normally highly creditworthy institutional investors (e.g., public or corporate pension funds, endowments and foundations, financial institutions, life insurance companies, and sovereign wealth funds) that have, among other things, an S&P rating of at least BBB- or a Moody's rating of at least Baa3 or are sponsored by such a creditworthy entity. Often, a separate subset of the investors that do not meet such credit criteria but nevertheless deemed by the lenders as having relatively strong credit are designated



as “Designated Investors.” Designated Investors are generally subject to concentration requirements as to size and type of investor (rated/unrated/sovereign wealth/high net worth, etc.) and availability with respect to Designated Investors is generally calculated as 65% of the aggregate unfunded capital commitments of the Designated Investors, and in such an instance availability under the facility is generally calculated as the sum of: (a) 90% of the unfunded capital commitments of the Included Investors; and (b) 65% of the unfunded capital commitments of the Designated Investors.

In this ever-evolving market, some lenders are even offering subscription facilities with flat advance rates of 50% applicable to all investors. Recently, private equity fund sponsors are also utilizing this financing for single investor, separately managed accounts, particularly for the strongest pension funds and sovereign wealth funds. In light of: (i) the numbers of commitments of investors, (ii) the size of commitments of investors, and (iii) the industry sector of investors included in the borrowing base of subscription facilities provide a more diverse base supporting repayment of the credit facility than many corporate credits.

Loan proceeds are available for myriad purposes, including bridge

financing, asset acquisition, asset development, equity investment, working capital purposes and other fund expenses. These facilities, which typically have maturities of one to three years, provide flexibility and pricing advantages over other more traditional forms of acquisition/mini-perm facilities in quick-close acquisitions, or in pre-stabilization repositioning situations where the asset is ultimately designated for traditional asset level financing.

A subscription facility may be syndicated (i.e., with a group of lenders providing the facility to the borrower) or bilateral (i.e., between a single lender and the borrower). By sharing the lending risk, a syndicated facility can address a borrower’s need for access to larger amount of capitals, with some facilities reaching the size of a few billion U.S. dollars. Moreover, a syndicated facility provides a borrower with access to broader network of financial partners, which affords significant risk mitigation for a borrower. A bilateral subscription facility, on the other hand, often provides more flexible and custom terms and conditions to meet the unique business demands of a borrower.

📄 *For further reading and analysis, please **download the full article.***

HEIGHTENED TENSIONS IN THE STRAIT OF HORMUZ: VESSEL OWNERS AND OPERATORS REVIEW THEIR OPTIONS

BY MARK JOHNSON

From my time as a Royal Navy officer navigating the busy shipping lanes of the Strait of Hormuz, I recognize the challenges of operating in and around this navigational chokepoint.

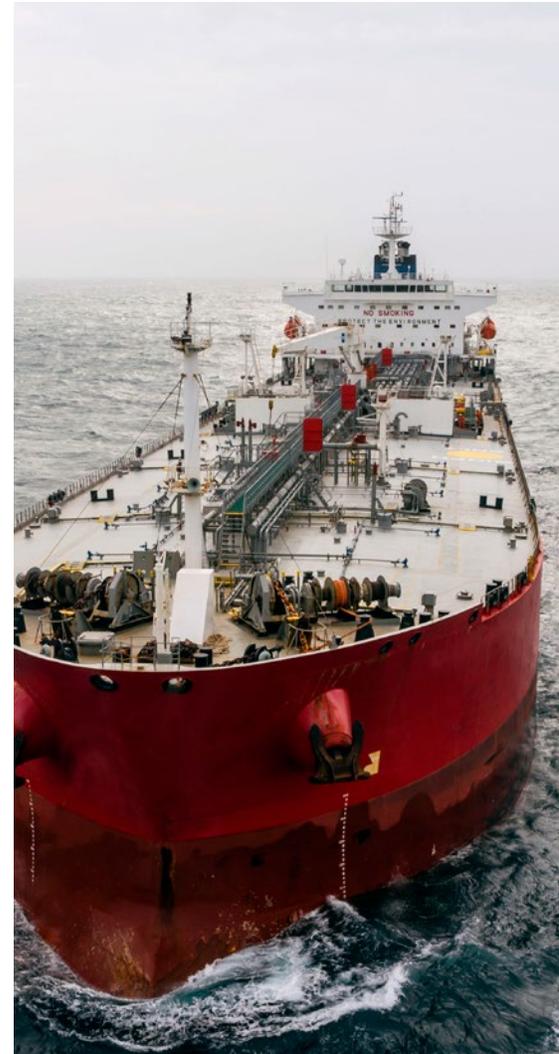
Each day, many of the largest ships in the world sail (at speed) through the two-mile wide traffic separation lanes, a multitude of smaller wooden trading and fishing dhows travel in all directions and swarms of speed boats (many apparently engaged in smuggling) cut close ahead and astern of larger vessels. To add to this complex navigational picture, simmering international tensions (including the seizure of vessels by Iran) leave crews constantly trying to determine whether any of the multitude of contacts is a risk to their vessel.

Indeed, at the time of writing, the risks (and associated costs) have grown sufficiently concerning that owners and operators, as this article will examine, have been carefully considering their options to mitigate the risk, including their ability to refuse to comply with charterer's orders requiring passage through the Strait of Hormuz. The attack on six tankers in May and June as well as the seizure and attempted seizure of three tankers in July

have resulted in heightened tensions in the region (as has the shooting down of both Iranian and United States military drones). The incidents in May, June and July evidence an alarming willingness by Iran to interfere with vessels on innocent passage and has resulted in a consequential increase in insurance premiums for vessels operating in and around the Strait.

Following a review of the risks and the costs (including increased insurance premium and potential crew bonus demands), a number of significant owners and operators have decided that discretion is the better part of valour and are not offering their vessels for employment that will require passage of the Strait.

For other owners and operators with contracts of affreightment to service or other charter commitments to or from ports in the Persian Gulf, a blanket refusal to sail any of their vessels through the Strait could give rise to significant charterer claims. Instead, these owners and operators will need to carefully consider their options, including whether events in and around the Strait give rise to a right to refuse to comply with charterer's orders that would necessitate passage of the Strait. At the time of writing, and subject to the drafting of



the specific charter, the common view, whether by way of war risks, unsafe port or by frustration, is that owners and operators will probably not be able to establish a right to refuse to comply with such charterer's orders.

This article examines the key rights an owner-operator typically has to refuse to comply with the orders of a charterer. Additionally, noting the challenges of invoking refusal rights on anything resembling standard charter terms, this article also examines some of the other options owners and operators may wish to consider to mitigate the risks associated with the Strait.

WAR RISKS CLAUSE

Relatively detailed war risks clauses are contained in most time charters (including SUPPLYTIME 2017) and voyage charters, commonly on BIMCO CONWARTIME 2013 or VOYWAR 2013 terms as appropriate. These clauses standardly have two key limbs. The first limb provides the definition of "War Risks" and the second limb sets out the basis (usually by application of an objective judgement of the owner and/or master) on which a vessel's

master and/or owner can refuse to comply with a charterer's orders requiring the vessel's entry into an area where there is a risk of exposure to war risks.

It is relevant for the charterer to note that in addition to affording an owner/master the ability to refuse to comply with a charterer's order, war risk clauses usually include arrangements for the discharge of cargo (to the extent relevant) in alternative ports. Furthermore, it is also common for war risk clauses to provide that, if a vessel proceeds in an area exposed to war risks, the charterer shall reimburse the owner for additional insurance costs (both insurance premiums required by owner's insurers and also the cost of additional insurances the owner reasonably requires) in connection with war risks and also any crew bonuses the owner may become liable to pay.

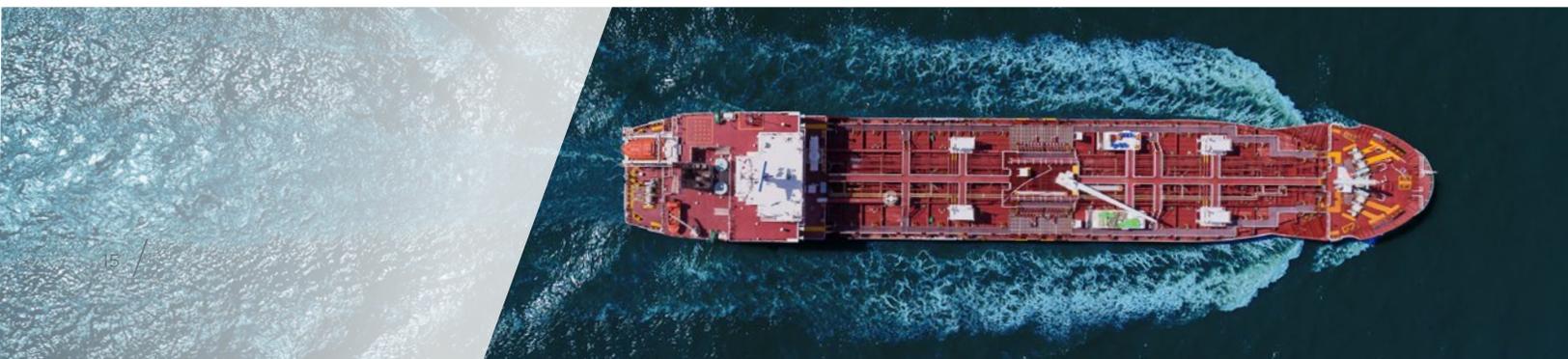
SAFE PORT

Charterers are obliged to order a vessel only to ports which are, at the time of the order, safe. In this context, *"a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without,*

in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship..." Leeds Shipping v. Société Française Bunge (The Eastern City) [1958] 2 Lloyd's Rep. 127.

The determination of whether a port is safe includes consideration of the approaches to the port. The Strait is not itself a port, but for a vessel outside the Persian Gulf ordered to a port in the Persian Gulf there is no option other than to sail through the Strait. As such, it might be argued that the Strait forms part of the approach to the relevant Persian Gulf port. However, even if the Strait was found to fall within the scope of the charterer's obligation to order the vessel only to safe ports, as of the time of writing, the number of vessels attacked/seized is very low compared to the total number of vessels transiting the Strait each day. As such, it is unlikely (in the absence of a significant increase in incidents or frequent targeting of vessels of specific character) that the recent attacks or seizures in the Strait would be categorised as anything other than *"abnormal occurrences."*

 For further reading and analysis, please [**download the full article.**](#)



A GUIDE TO BUSINESS INTERRUPTION INSURANCE FOR THE ENERGY INDUSTRY

BY DAVID BENDER AND CAROLINE HURTADO FORD

When a company incurs financial loss due to an interruption of its business, it should look to its property policy to provide coverage for all or a portion of the loss. The aim of this article is to give an overview of business interruption coverage from authors with decades of experience representing insureds in the energy sector who face property loss and business interruption issues.

Business interruption coverage issues arise when the company is purchased, enters into transactions with third parties and when it sustains an interruption of its business operations because of damage to property.

KEY ISSUES AT POINT OF PURCHASE

Like all insurance policies, a property policy that includes coverage for business interruption loss is simply a risk-transfer contract from the purchaser (the insured) to the insurance company (the insurer). Therefore, our starting point is: What risks does the company wish to transfer to its insurance company and does the policy language in fact transfer those risks?

NAMED PERILS VS. ALL-RISK COVERAGE

First-party property/business interruption coverages are generally written in two different

ways: named perils or all-risk. Under a named perils policy, the policy sets forth specific perils that are covered. If the cause of loss is not included in one of those enumerated perils, there is likely no coverage unless another part of the policy can be triggered. Under a named perils policy, the company has the burden of proof to establish that the cause of the loss was a named peril.

In contrast, an all-risk policy covers all perils except for any perils that are specifically excluded. Therefore, with an all-risk policy, the company need only establish that physical damage (or the other requirements necessary to trigger a loss) occurred and the loss was not caused by an excluded peril. The insurer then bears the burden of proof to establish that the cause of loss was excluded under the policy.

VARIOUS TYPES OF TIME ELEMENT LOSS

Business interruption policies cover various types of losses defined as “time element losses.” The following chart summarizes these coverages:



TYPE OF COVERAGE	DESCRIPTION/NOTES	ENERGY INDUSTRY EXAMPLE
Business Interruption	<p>This coverage provides for the lost income sustained as a result of the need to shut down operations because of physical damage to insured property.</p> <p>An issue to be considered is whether “interruption” is defined in the policy. Some policies require a complete shutdown of operations. However, other policies only require a partial shutdown.</p> <p>In most jurisdictions, if the policy is ambiguous regarding a term or definition, any ambiguity is to be construed against the insurer. Litigating ambiguity is not simple, however, and can be costly. It is therefore a best practice to define, when purchasing the insurance at the outset, what constitutes an “interruption” for purposes of triggering coverage.</p>	<p>An oil refinery is damaged as a result of flood and wind damage due to a hurricane. The refinery must suspend operations and faces a disruption in production. The oil refinery’s business interruption policy will cover the lost income sustained during the shutdown due to the hurricane damage.</p>
Extra Expense	<p>Extra expense is the extra cost of conducting the company’s business during the period of restoration. It can include, for example, the cost of operating at a different location, increased costs of production, or any other additional costs incurred by the company that would not ordinarily have incurred that is needed to conduct the business due to the property damage.</p>	<p>The same oil refinery that was forced to suspend operations as a result of the flood and wind damage due to the hurricane must now transport its product from a different, more costly location in order to meet its production demand or face more significant losses under its contractual obligations to purchasers. This extra expense should be covered by the oil refinery’s property policy.</p>
Contingent Business Interruption/Extra Expense	<p>Contingent business interruption and extra expense does not require any physical damage to the company’s property. Instead, it is triggered when there is physical damage to the property of a supplier, a distributor/customer, or a transporter.</p> <p>The benefit of this coverage is that it provides coverage for situations which interrupt operations even though the insured property itself did not suffer any damage.</p>	<p>An oil refinery depends on a single supplier for most of the steel used in its production and processing operations. The steel manufacturer’s production was affected by a hurricane. Contingent business interruption would protect the oil refinery from the impact to its main steel supplier’s production.</p>
Civil/Military Authority	<p>This coverage extension also does not require actual damage to the property. However, if there is nearby damage (usually limited to within a specific geographic area like a mile, for example) and civil or military authorities refuse to allow the company to access its property, the policy will provide coverage.</p> <p>This coverage only applies if the civil/military authority prevents access to the site. If the company’s employees are allowed at the site but civil/military orders refuse to allow operations, this coverage is likely not triggered.</p>	<p>The federal agency responsible for pipeline safety shuts down an oil refinery following a nearby pipeline rupture and barricades the five-mile radius surrounding the oil refinery, prohibiting access. This shutdown is required while the agency investigates and tests for the integrity of the structures. The oil refinery’s property insurer should provide coverage for the time during which it could not carry out its business operations because of the federal agency’s forced shutdown and related inability to access the refinery.</p>
Off-Premises Services	<p>If utility service to the property is interrupted offsite and the property cannot operate as a result, this coverage extension will apply.</p>	<p>The off-site power generating station that supplies electricity to an oil refinery is damaged as a result of a hurricane. As a result, the oil refinery cannot function.</p>

 For further reading and analysis, please [download the full article](#).

TEXAS COMPTROLLER: CERTAIN SOLAR GENERATION FACILITY EQUIPMENT MAY NOT BE EXEMPT FROM SALES TAX

BY MICHAEL THREET

On August 7, 2019, the Texas Comptroller released Policy Letter Ruling No. 201907005L (dated July 8, 2019) addressing whether certain sales tax exemptions under Texas Tax Code Section 151.318 apply to equipment purchased to construct solar and wind electric generation facilities. In this policy letter ruling, the Comptroller concluded that solar panels that convert sunlight into direct current electricity, as well as collection systems that convert the direct current into alternating current, are exempt from sales tax.

However, the Comptroller also concluded that fixed racking, tracker racking, and support posts used to position solar panels for maximum energy production are not exempt as “components of manufacturing equipment” when used to hold and support multiple solar panels—the usual configuration.

According to the Comptroller, to be a component of manufacturing equipment, and thus qualify for sale tax exemption, something must be “reasonably essential” to the functioning of a *single* item of qualifying manufacturing equipment. Because the racking and support posts are used

to secure or position multiple solar panels in a row, they do not function as components of, nor are they essential to the functioning of, a *single* solar panel. Accordingly, because the racking and support posts are not components of a *single* piece of manufacturing equipment, the Comptroller concluded that these items do not qualify for exemption.

Note that a policy letter ruling (a “PLR”) is the Comptroller’s written statement of its policy regarding the application of relevant tax laws and rules to a

specific set of facts submitted by a taxpayer. Although a PLR may be relied upon by the taxpayer requesting it, it is not binding on that taxpayer, or on any other taxpayer. A PLR is not the law—it is only the Comptroller’s position regarding the law—and is therefore subject to challenge.

A challenge to the Comptroller’s position in this PLR could arise from the Comptroller’s apparent overstatement of the requirement, gleaned from the authorities cited in the PLR, that racking and support posts must be components of a single



piece of equipment to qualify for exemption. For example, *Southwest Airlines, Inc. v. Bullock*, 784 S.W.2d 563 (Tex.App.-Austin 1990, no writ) and Comptrollers Decision No. 44,820 are cited by the Comptroller as requiring that “an item must be ‘reasonably essential’ to the functioning of a single item of manufacturing equipment to be considered a component of the equipment.” However, neither cited authority mentions a requirement that a component support a single item of equipment. Furthermore, exemption was denied in Decision No. 44,820 because the taxpayer failed to carry its burden of proof, not because the carts at issue supported both a popcorn popper and a soft drink dispenser.

PLR No. 200002044L, cited by the Comptroller as stating a rule that “[s]upports that house or hold several pieces of equipment (e.g., several solar panels) are not parts or components of any one piece of equipment and do not qualify for exemption,” addresses

a specific requirement under TTC 151.318(c)(1)(A) that piping and conveyor systems must be a component part of a single item of equipment to avoid taxation as intraplant transportation equipment, and is therefore clearly distinguishable from the items, and issues, addressed in the current PLR. Additionally, PLR No. 200002044L identifies “the legs of a machine” as an example of peripheral supports that are qualifying component parts of manufacturing equipment and specifies “the framework of a plant” as an example of supports that hold several pieces of equipment and thus do not qualify for exemption. Racking and support posts seem more analogous to the legs of a machine than to the framework of a plant. Comptrollers Decision No. 42,916, cited by the Comptroller for its conclusion that “server racks holding several servers were not component parts of those servers,” determined that a server rack was taxable because it “merely props up

manufacturing equipment” not because it supports multiple servers. In addition, Comptrollers Decision No. 40,495 (not cited by the Comptroller though cited in Decision No. 42,916) found that a platform supporting several pieces of exempt manufacturing equipment was taxable because “the platform is in the nature of realty, as opposed to personalty” not because it supported multiple items of equipment.

While the Comptroller’s conclusions with respect to racking and support posts may be troubling to those who construct solar generating facilities, this PLR is unlikely to be the final word on the subject and challenges to the Comptroller’s position should be expected.

↓ For further reading and analysis, please [**download the full article.**](#)



ENERGY LAW UPDATES AND EDITORIALS

ALLOCATION WELLS - STILL NO GUIDANCE FROM THE TEXAS LEGISLATURE OR COURTS

BY MICHELLE SCHEFFLER AND GARRETT MARTIN

The law regarding allocation wells—horizontal wells that cross several tracts and/or leases without pooling such interests—remains an evolving area. While many other jurisdictions, including Pennsylvania and Oklahoma, have passed legislation permitting and regulating allocation wells, the Texas legislature has yet to provide the same guidance to the oil and gas industry in Texas. And, while several cases have been filed challenging the validity of allocation wells, none of those cases has resulted in a decision from a Texas appellate court as of yet.

In 2015 Texas State Representative Tom Craddick introduced House Bill 1552 in an attempt to provide clarity regarding allocation wells. Oil and gas producers were in favor of the bill, which would have legislatively validated allocation wells in Texas and given producers guidance regarding payment of revenue among interest owners. Mineral owners, on the other hand, spoke out against the bill. House Bill 1552 fizzled without being passed, leaving the industry still at odds over the legality of allocation wells.

The failure of House Bill 1552 was followed by a new allocation well lawsuit concerning Barnett Shale acreage in Montague County, Texas, *Spartan Texas Six Capital Partners, Ltd. v. Perryman*. In that suit, mineral owners alleged that EOG Resources improperly unitized and pooled the mineral owners' acreage in violation of their leases. Claims between the mineral owners and EOG Resources were settled before trial.

↓ For further reading and analysis, please [download the full article](#).

THE SUPREME COURT OF TEXAS WEIGHS IN ON THE ENFORCEABILITY OF CONSENT-TO-ASSIGN PROVISIONS

BY MICHELLE SCHEFFLER AND GARRETT MARTIN

In June 2018, the Supreme Court of Texas refused to read a reasonableness qualification into a consent-to-assign provision and instead held that consent could be withheld, even arbitrarily. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas Inc.*, No. 17-0332, 2019 WL 2668317 (Tex. June 28, 2019). Consent-to assign provisions are common in the energy industry in everything from oil and gas leases, to joint operating agreements, and other asset agreements. As such, the Court's decision is likely to reverberate in industry circles for some time.

Consent-to-assign clauses are designed to protect mineral-interest owners in de facto partnerships with their co-interest owners from suddenly assigning an interest in the business relationship to a fly-by-night outfit. These provisions generally come in one of two types: (1) a "soft" consent that requires a valid justification for withholding consent, usually that the assignment is to an irreputable party that will harm the financial interests of all interest owners and (2) a "hard" consent that allows consent to be withheld for any reason or no reason at all. Holders of hard consent rights receive better protection from risky assignments, but the counter-party is left at the right-holder's mercy. The Court's recent opinion is a perfect illustration of this balance of interests.

Barrow-Shaver executed a farm-out agreement with Carrizo that stated Barrow-Shaver's resulting mineral rights would "not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo."

↓ For further reading and analysis, please [download the full article](#).



OP-ED: IT'S TIME FOR TEXAS OIL AND GAS TO EVEN THE ODDS

BY BUDDY CLARK

As two of the largest oil and gas states, Texas and Oklahoma are both painfully aware how the ups and downs in the oil and gas industry can adversely impact their citizens. In the 1980s, both states responded to a severe industry downturn in an effort to protect their royalty owners and producers. Each state passed laws intended to create liens to secure payment for the sale of oil and gas produced in their state.

These laws were tested in 2008 when SemCrude, a major oil and refined products marketing company, went bankrupt following speculative bets on the price of crude. SemCrude ended upside down on its bet and costed the company \$3.2 billion in losses. Many producers in Texas and Oklahoma had delivered crude to SemCrude prior to its bankruptcy and never received payment. Once SemCrude filed, all kinds of creditors asserted claims in excess of the company's ability to pay.

Texas and Oklahoma producers thought they had the upper hand based on the liens created under their states' laws in the 1980s. Unfortunately, SemCrude's bankruptcy was filed in Delaware, where the company was domiciled, and the bankruptcy court applied Delaware lien laws and not the laws of the states where the oil had been produced. Long story short, the court rejected Texas and Oklahoma producers' lien claims, leaving them collecting pennies on what they were owed.

📄 *For further reading and analysis, please [download the full article.](#)*

UPCOMING HAYNES AND BOONE ENERGY EVENTS

OIL CRASH COURSE October 2019	HOUSTON GULF COAST POWER ASSOCIATION FALL CONFERENCE October 2019	RICE ENERGY FINANCE SUMMIT November 2019
NEW YORK OIL AND GAS FINANCE AND INVESTMENT SERIES October 2019	ST. PETE BEACH IECA FALL CONFERENCE October 2019	Please see your Haynes and Boone contact for further information about these or other events.

HAYNES AND BOONE ENERGY NEWS

THE BEST LAWYERS IN AMERICA 2020 FEATURES HAYNES AND BOONE LAWYERS

More than 100 of our lawyers from across the firm were selected for inclusion in the 2020 edition of *The Best Lawyers in America* directory published by Woodward/White, Inc. Many of those recognized are in the Energy, Power and Natural Resources Practice Group.

HAYNES AND BOONE WINS BROAD RECOGNITION IN CHAMBERS USA 2019

More than 50 Haynes and Boone lawyers spanning 18 practice areas are featured in the 2019 edition of the *Chambers USA* legal directory published by Chambers and Partners. The firm ranked in Energy: State Regulatory and Litigation (Electricity) (Texas) and Environment (Texas).

TEXAS SUPER LAWYERS 2019 FEATURES HAYNES AND BOONE

Fifty Haynes and Boone lawyers have been recognized in the 2019 edition of *Texas Super Lawyers*, published by Thomson Reuters, including many in our Energy, Power and Natural Resources Practice Group.

THE LEGAL 500 2019 RECOGNIZES HAYNES AND BOONE

The firm earned its first *Legal 500* U.S. ranking in the Industry Focus category for Energy Litigation: Oil and Gas. *The Legal 500* series analyzes the capabilities of law firms across the world, based on feedback from 300,000 clients worldwide, law firm submissions, and interviews with leading private practice lawyers.

CHAMBERS LATIN AMERICA 2020 RECOGNIZES HAYNES AND BOONE

Haynes and Boone and lawyers in its Mexican affiliate, Haynes and Boone, SC, have been featured in the 2020 edition of the *Chambers Latin America* legal directory published by Chambers and Partners. The directory recognized the firm's lawyers in the Energy, Power and Natural Resources Practice Group as leaders in Mexico and observes that the group "is adept at handling oil and gas mandates, bolstered by the firm's notable presence in Texas for oil and gas mandates." *Chambers* added that the team is "experienced [at] advising oil companies on joint ventures, purchase and sale agreements and public bids."

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